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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1997

Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
	)	
Petition of MCI for	)	CC Docket No. 96-98
Declaratory Ruling	)	CCBPol 97-4
	)	
	)	

COMMENTS OF SPRINT

Sprint Corporation ("Sprint") respectfully submits its response to the Commission's March 14, 1997 Public Notice inviting comments on the Petition of MCI Telecommunications Corp. for a Declaratory Ruling. Sprint's different subsidiaries provide local exchange, interexchange, and wireless communications. Sprint's incumbent local exchange carriers (ILEC) commonly have intellectual property (IP) agreements with outside vendors. Sprint is also seeking to enter new markets as a competitive local exchange carriers (CLEC). Sprint therefore believes it is uniquely situated to provide valuable insights into the important questions the Petition has raised.

SUMMARY

Sprint believes that a state or local government's requirement that a new CLEC obtain a separate license or right-to-use agreement before the latter can obtain unbundled network elements could violate Section 253(a) of

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the Communications Act. The Commission should examine these matters on a case-by-case basis. However, the Commission should also declare that if an ILEC refuses to provide unbundled network elements because of IP concerns, the ILEC has an obligation to identify for a requesting CLEC those IP agreements which the ILEC believes would be violated by a provision of unbundled elements. The ILEC should also provide a brief explanation to the CLEC for the basis of its belief.

The Commission should also require ILECs to negotiate with IP vendors for any necessary modifications to agreements which prevent the ILEC from providing unbundled elements. The Commission should make clear that ILECs are required to negotiate in good faith for such modifications and that the Commission might bar an ILEC from making future capital purchases from a particular vendor if the ILEC is consistently unable to obtain the necessary modifications from a particular vendor.

COMMENTS

MCI's Petition for Declaratory Ruling and the Petition for Reconsideration by the Local Exchange Carrier Coalition (LECC) touch only generally upon the thorny issues raised by intellectual property (IP) agreements that ILECs have with their outside suppliers. MCI, for example, asks that the Commission issue a declaratory ruling stating that ILECs

cannot refuse access to unbundled network elements on the basis of restrictions contained in IP agreements to which the ILEC and its outside vendors are parties.

In particular, MCI requests that "the Commission declare that any requirement imposed by an ILEC or a state or local government that a new entrant obtain separate license or right-to-use agreements before they can purchase unbundled network elements violates Sections 251 and 253 of the Act." A requirement imposed by a state or local government that a new CLEC obtain a separate license or right-to-use agreement before the latter can obtain unbundled network elements could conceivably violate the provisions of Section 253(a) of the Act.[1]

Sprint believes that the Commission should examine individual actions of this kind by state or local governments on a case-by-case basis. The factual circumstances surrounding these requirements is likely to differ substantially, potentially leading to different results in different cases.

For example, for a state commission to require a CLEC to identify all of the outside vendors with whom the ILEC might conceivably have IP agreements is likely to prove

[1] That section provides "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

difficult, if not impossible, for the CLEC and have the effect of prohibiting the CLEC from competing with the ILEC. The requirement by a state commission that an ILEC need merely provide a CLEC a laundry list containing only the names of scores of vendors and contracts whose IP rights the ILEC believes might be infringed upon might also have the same effect.

Some IP agreements may contain confidentiality clauses, raising issues of the ability of a regulatory agency to order disclosure of such contracts or the need to fashion appropriate protective orders. Such disclosure may also potentially open ILECs to liability, as LECC pointed out in its Petition for Reconsideration at 27. These kinds of decisions should be made in the context of individual contracts rather than in generalized declaratory rulings.

While Sprint believes that these issues should be decided on a case-by-case basis, it also believes that adoption of the following principles and procedures would ensure that ILECs and CLECs resolve as many of these issues as possible in their negotiations. This should minimize the number of IP agreements with which a state commission or the FCC will have to contend.

Based upon its experience, Sprint believes that providing access to unbundled network elements generally will not implicate the intellectual property rights of third

parties.[2] If third party rights are implicated, the issue will most likely surface in the scope of rights granted in software licenses. Software is not typically purchased, but instead the owner of the software grants a license to the user to use the software in a prescribed way. Because software is now used in network elements such as local switching, it is common that when purchasing the equipment, the equipment purchaser will also receive a software license.

The rights granted in a software license, which is generally referred to as the "license grant," are often negotiated in software agreements. It is, of course, possible that the ILECs have routinely not negotiated license grants that provided the ILEC flexibility to offer unbundled network elements. However, Sprint believes that generally few agreements would be implicated.

Most factors that will determine whether ILECs have the right to provide unbundled elements are uniquely within the control of the ILEC. These include the control that the ILEC had in selecting the software and negotiating the license, and the ILEC's unique ability to interpret ambiguous provisions of its license agreements.

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[2] Sprint notes that to date its local telephone companies have never told a CLEC that the CLEC is required to negotiate with one of Sprint's vendors on IP issues before the CLEC can have access to unbundled network elements. Moreover, Sprint continually seeks to improve the terms of its licenses from its vendors because it is in Sprint's interest to do so.

Absent a declaratory ruling that it is the ILEC's responsibility to obtain the license rights necessary to provide unbundled network elements, the ILECs have an incentive to hinder and delay competition. The ILECs also have an incentive to select equipment and software with restrictive license grants, and to team with software providers to narrowly interpret license grants.

To the extent other IP rights, such as patents, may be implicated, Sprint believes that the ILEC is in the best position to determine if these rights are implicated. The CLEC does not have a view of the ILEC's network and network elements sufficient to determine if any third party rights are infringed. If rights are infringed, then the ILEC is in the best position to design around, or to negotiate rights. It will likely be a rare instance that the ILEC must not also negotiate to obtain rights for its network and network elements. The ILEC should be responsible for obtaining necessary rights associated with the ILEC's network and network elements and it should not be permitted to systematically exclude third parties from access to its network elements.

Sprint therefore believes it is reasonable for the Commission to grant in part MCI's petition and to clarify

its decision in CC Docket No. 96-98[3] in the following manner.[4] First, the Commission should grant MCI's petition insofar as it would place the initial burden upon the ILECs to identify specifically for a requesting CLEC those IP agreements which the ILEC believes would be violated by the provision of unbundled elements.[5] The ILEC should also explain briefly in writing to the CLEC the basis for its belief although it need not disclose the actual contract at this point.[6]

The Commission should also grant MCI's petition insofar as it would place the burden upon the ILEC to negotiate within a reasonable period (*e.g.* three months) any license

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[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *recon.* 11 FCC Rcd 13042 (1996), *review pending and partial stay granted sub nom.* Iowa Utilities Board, et al. V. FCC, No. 96-3321, (8th Cir.), filed October 15, 1996 (''Interconnection Order'').

[4] In its petition for reconsideration of the Interconnection Order, LECC has requested that the Commission seek more strongly to determine whether access to a network element that is admittedly proprietary must be granted unless a demonstration is made that the requesting carrier could offer the proposed telecommunication service through the use of other, nonproprietary elements in the incumbent LEC's network. LECC Petition for Reconsideration at 27.

[5] The ILEC would only be required to identify the third party if it refused to provide the unbundled elements as a result of third party's IP rights. If it did not refuse to provide the unbundled elements, of course, there would be no need for such identification.

[6] The old Interstate Commerce Commission employed a similar summary disclosure mechanism for railroad contracts, described in Water Transport Association v. ICC, 722 F.2d 1025 (2d Cir. 1983). The ICC provided for a disclosure of a summary of the relevant contracts first, and for subsequent disclosure of the actual contracts themselves if adequate need was demonstrated.

modifications or extensions of IP agreements that are required to provide unbundled network elements.[7] If the ILEC is not able to negotiate such an extension or modification, it should be required to demonstrate to the state commission or the FCC why it was unable to do so. The state commission or the FCC might then mediate additional negotiations between the ILEC and its vendor. These agencies might also require the ILEC and its vendor to arbitrate IP issues if the vendor consents.

Because some ILECs may lack incentives to negotiate vigorously for such modifications or extensions, Sprint believes the Commission should supply the necessary incentives. The Commission should make clear that "sham" or perfunctory attempts to negotiate with outside vendors may violate the ILEC's Section 251(c)(1) duty to negotiate in good faith which may be penalized.[8]

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[7] Matters such as the additional compensation, if any, that a vendor wants in exchange for modifying or extending a license should also be reviewed in the context of individual agreements if the ILEC and CLEC cannot agree on how these charges should be apportioned. If there are any additional costs that are incurred by the ILEC in order to negotiate on behalf of a CLEC, such costs should, to the extent they are reasonable, be reimbursed by the CLEC. Sprint also believes that license fees or royalties should be structured so as to not discriminate between an ILEC and a CLEC.

[8] Sprint does not believe that the duty to negotiate in good faith that is imposed upon ILECs by Section 251(c)(1) is limited to negotiations between a CLEC and an ILEC. Neither the language of the statute nor the legislative history so limit that duty. Sprint also observes that in the Interconnection Order, the Commission specifically found that "actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith." Interconnection Order at para. 153 (fn. omitted). With respect

The Commission should also consider other means of encouraging ILECs and their vendors to reach agreement. The Commission might, for example, consider limiting the ILEC's ability to make future purchases of capital goods from a particular vendor if the ILEC is consistently unable to obtain the necessary modifications to IP agreements with that vendor.[9] Again, however, these policies and procedures should be applied to specific agreements.

MCI also asks that the Commission declare that any requirement imposed by an ILEC (as opposed to a state or local government) that a new entrant obtain separate license or right to use agreements before they can purchase unbundled network elements violates Sections 251 and 253 of the Act. It asks the Commission to declare that the Act's nondiscrimination requirements require ILECs to provide the

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to the Bell Operating Companies (BOCs), a BOC's willingness to negotiate with IP vendors in good faith should be considered in determining whether inter-LATA entry by a particular BOC would serve the public interest under Section 271 of the Communications Act.

[9] The Commission took similar action in a 1981 decision withholding approval of AT&T's application for a certificate of convenience and necessity under Section 214 of the Communications Act to purchase from its subsidiary, the Western Electric Company, fiber optic facilities between New York City and Cambridge, Massachusetts. AT&T, 84 FCC 2d 303 (1981). The Commission rejected AT&T's argument that AT&T's procurement practices should not be considered in a 214 proceeding, finding that the Commission had to find that the public interest would be served by AT&T's proposal to buy from Western. 84 FCC 2d at 313. It required AT&T to provide sufficient information to other vendors of fiber optic facilities so as to ensure that the latter could "make meaningful bids" to supply those facilities, 84 FCC 2d at 316. Such action with respect to an ILEC's procurement practices would not be an impermissible attempt to regulate the vendor, but only a finding that the public interest would not be served by the ILEC's continuing to do business with a particular vendor.

same rights to use this intellectual property to new entrants as the incumbent LECs themselves enjoy.[10]

This request raises different legal issues. For one, it is unclear that the Commission has jurisdiction under Sections 251 and 253 of the Act to pre-empt as a barrier to entry an ILEC's (as opposed to a state or local government's) requirement that the CLEC secure any necessary IP licenses or agreements.[11] For another, MCI appears to argue that an ILEC is always responsible for the actions of a party over which the ILEC has no control: MCI would apparently have the Commission punish an ILEC for an unregulated vendor's lawful refusal to extend the terms of existing IP agreements to CLECs.[12]

The ILEC, however, may, despite its good faith best efforts, be unable to persuade its vendor to agree to a needed modification. Under such circumstances, Sprint questions whether it is fair to always hold the ILEC responsible for an unfavorable outcome. The difficulties engendered by an uncritical adoption of MCI's proposal simply confirm Sprint's belief that these issues should be

[10] MCI Petition at 2-3.

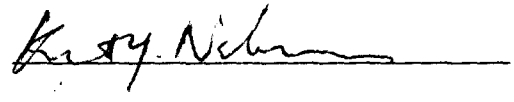
[11] Section 253's preemptive effect only extends to actions by State or local authorities to raise barriers to entry, and not to actions by carriers.

[12] Sprint doubts whether the Commission has the power to abrogate contracts between an ILEC and an unregulated third party that is not

considered and decided on a case by case basis under the principles and procedures Sprint suggested above.

Respectfully submitted,

SPRINT CORPORATION

By: 

Leon M. Kestenbaum
Jay C. Keithley
Kent Y. Nakamura

Its Attorneys

1850 M St., N.W.
11th Floor
Washington, D.C. 20036
(202) 857-1030

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also a carrier. *See* Regents of University System of Georgia v. Carroll, 338 U.S. 586 (1950).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT** was sent by hand or by United States first-class mail, postage prepaid, on this the 15th day of April, 1997 to the below-listed parties

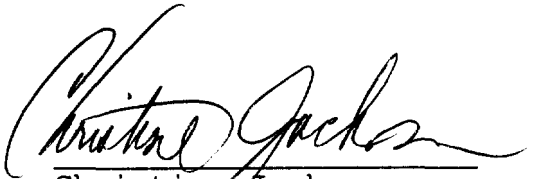
Lisa B. Smith
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

International Transcription
Service
1919 M Street, N.W., RM 246
Washington, D.C. 20554

Kalpak Gude
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

Richard Welch
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554



Christine Jackson

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